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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JACOB M., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

BARBARA C.,

Defendant and Appellant.

D055843

(Super. Ct. No. NJ13984B)

APPEAL from an order of the Superior Court of San Diego County, Gary M.

Bubis, Judge. Affirmed.

Barbara C. appeals the juvenile dependency court's 12-month review order continuing the foster care placement of her son Jacob M. Barbara contends the court erred by failing to return Jacob to her custody. We affirm.

I

BACKGROUND

In July 2008, when Jacob was 14 years old, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition alleging he was exposed to violence between Barbara and her husband, James C. Jacob was detained in a foster home. In August the Agency filed an amended petition adding an allegation that Barbara used heroin, methamphetamine, marijuana, and Valium to excess. In September the court entered true findings on both allegations, ordered Jacob placed in foster care and ordered Barbara to participate in reunification services.

Jacob remained in the same foster home throughout this case. At the September 2009 12-month review hearing, the court declined to return him to Barbara. The court set an 18-month review hearing.

II

DISCUSSION

A. The Agency's Motion to Augment the Record

With its respondent's brief, the Agency filed a motion to augment the record on appeal with an 18-month review report. The report was filed in juvenile court after the 12-month review hearing and discusses subsequent events. The Agency claims the report is relevant to show why it requests affirmance, although in the juvenile court it recommended Jacob be returned to Barbara. Barbara opposes the augmentation motion,

arguing she had no opportunity to challenge the contents of the report and this court need not understand why the Agency has changed its position. We agree and deny the motion.

B. The Detriment Finding

1. Legal Framework and Contentions

At the 12-month review hearing, the court must return the child to the parent's physical custody unless it finds, by a preponderance of the evidence, that return "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.21, subd. (f).) The juvenile court may consider the parent's past conduct. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.) Although the court must consider the parent's progress in services and capacity to meet the reunification plan's objectives (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899; *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1139-1140, 1143), "the decision whether to return the child to parental custody depends on the effect that action would have on the physical or emotional well-being of the child." (*In re Joseph B.*, *supra*, at p. 899.)

We apply the substantial evidence test (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 974), reviewing the record in the light most favorable to the order (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545). We do not reweigh conflicting evidence (*Constance K. v. Superior Court*, *supra*, 61 Cal.App.4th at p. 705), and we do not disturb the juvenile court's assessments of demeanor and credibility or the reasonable inferences it draws from the evidence (*In re Joseph B.*, *supra*, 42 Cal.App.4th at p. 901; *In re Alvin R.*, *supra*, at p. 974; *In re Misako R.*, *supra*, at p. 545). "The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also

exists and the trial court might have reached a different result had it believed other evidence." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Barbara contends the court erred by finding Jacob's return to her custody would create a substantial risk of detriment to his emotional well-being. She claims she had made sufficient progress to allow Jacob to return safely and Jacob was not at risk of suffering serious emotional damage. The Agency and Jacob argue for affirmance.

2. Analysis

The juvenile court found Barbara had made progress with her reunification plan, but Jacob's return to her custody would create a substantial risk of detriment to his emotional well-being. In support of the latter finding, the court cited the family's history; Jacob's distrust of Barbara; his need to heal emotionally; his wish to remain in the foster home despite his close ties to his siblings who lived with Barbara;¹ and his demeanor when testifying—sincere, quiet and struggling to communicate. Substantial evidence supports the court's detriment finding.

This family has a long history of domestic violence, substance abuse, neglect, and child welfare referrals, starting with Barbara and Jacob's father, and continuing during Barbara's relationship with James. The family never spent more than six months in one place. When they could not afford a hotel room, Jacob lived with his grandparents "on and off"—the only times he felt safe. Barbara used drugs and drank and sometimes left

¹ Jacob's two siblings were returned to Barbara in March 2009, six months before the 12-month review hearing.

home for up to five days at a time. Jacob testified that Barbara and James were always gone or on drugs. Both Barbara and James have criminal records. James's record is lengthy and includes violent offenses. Due to an unstable home life, Jacob changed schools often and missed many days of school.

After the inception of this case, Jacob refused to visit Barbara, relenting only when James threatened to take away a sibling's video game system. Even then, Jacob only visited when he knew one of his siblings would be present. Visits were supervised until January 2009. In April or May, around the time Jacob began overnight visits, Barbara relapsed. By July Jacob was spending most weekends at Barbara's home. In July Barbara, James, Jacob and his siblings began weekly family therapy. In August the therapist reported Jacob was "making progress at communicating his feelings directly to [Barbara] and [James]"; the family's prognosis was "good provided that [Barbara and James] maintain[ed] their sobriety"; and there was "no reason why Jacob should not return home at the earliest possible time." James testified the four family therapy sessions had not helped him. There is no indication the therapist had addressed Jacob's emotional scars or needs.

By the time of the September 12-month review, Jacob was not ready to return to Barbara. He craved the stability he had found in foster care, did not trust Barbara or James and was afraid Barbara would relapse again and cause more disruption. (Cf. *In re Alvin R.*, *supra*, 108 Cal.App.4th at p. 974.) Although the Agency recommended Jacob be returned to Barbara, the social worker believed that until Barbara "established a stronger base in [her] recovery[, Jacob] could be subject to the same abuse/neglect which

brought [him] to the attention of the Agency." Barbara had completed just 28 of the 52 sessions of her domestic violence program.

Substantial evidence supports the court's finding that Jacob's return to Barbara would create a substantial risk of detriment to Jacob's emotional well-being.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.